Concurring Statement of Commissioner Jon Leibowitz
Genzyme Corporation's Acquisition of ILEX Oncology, Inc.
File No. 041-0083

I support the conclusion reached by my fellow Commissioners to approve the consent order regarding Genzyme's acquisition of ILEX. Through this transaction, Genzyme intends to acquire ILEX's key oncology product Campath. However, because a small percentage of Campath sales are used off-label for acute therapy in solid organ transplants ("SOT"), a significant competitive problem arises concerning the overlap between ILEX's SOT use and Genzyme's Thymoglubin acute therapy SOT product. The relief provides a solution designed to protect consumers against the likely harm otherwise caused by this transaction, while allowing the parties to move forward, even though it creates entanglements that could raise serious concerns under a different set of facts. Thus, I write separately to clarify my support for the relief here, and to express some general observations on merger policy, which I am sure will continue to develop during my tenure here at the Commission.

Merger enforcement is a vital component of the Commission's mission. We are charged under the Clayton Act with ensuring that competition and consumers do not suffer from transactions whose effects may be to "substantially lessen competition." Of course, the Clayton Act provides no inalienable right to merge. It is important, then, for the Commission to rigorously scrutinize each transaction we review in fulfilling our mission. Where a transaction may substantially lessen competition, a high burden should be placed on the parties to show that harm is demonstrably outweighed by efficiencies or that potential relief restores competition. My fellow Commissioners and our attorneys, economists and staff take our responsibility very seriously.

At the same time, where transactions present potential economic benefit – through efficiencies or enhanced research and innovation – we should weigh those benefits relative to the likely harm, and not seek to impose unnecessary obstacles to the parties achieving those benefits. In particular, each merger should be reviewed carefully on its merits and its own facts, and we should remain flexible in considering remedies that restore competition.

My support of the remedy regarding Genzyme's acquisition of ILEX is consistent with these principles. *Absent the relief*, this transaction would have resulted in significant harm to consumers through increased prices and a possible reduction in research and innovation. And since the original transaction's purported efficiencies (assuming they were cognizable under the Merger Guidelines) were not sufficient to reverse the likely anticompetitive harm, it was incumbent that the parties demonstrate that the relief effectively restores competition.

Here, the remedy likely accomplishes that purpose. It is a creative solution – severing Genzyme from its rights and revenues relating to use of ILEX's Campath product in the SOT market (while allowing Genzyme to maintain its rights and revenues to the product in the oncology market) in a manner that substantially diminishes the likelihood of anticompetitive harm.

As a general matter, creative and flexible remedies should be encouraged where we are

confident they will succeed in restoring competition. However, no matter how creative the parties are in devising relief, and no matter how flexible the Commission is willing to be, such an approach will not work in many situations. The specific facts concerning each transaction will drive the analysis.

The unique facts of this case add assurance that the relief will work. For example, virtually all of Campath sales are derived from the competitive oncology market, and only a very small portion of its sales are attributable to SOT use. Thus, the price of Campath is constrained by the oncology market (not the SOT market), substantially diminishing the ability or incentive of Genzyme to attempt a price increase on Campath. Another key fact that allows the remedy to work here is the divestiture to Schering AG of the Campath SOT rights and revenues. Schering AG was already responsible (through a pre-merger relationship with ILEX) for distributing and marketing Campath in the United States, and thus is well-positioned to acquire the ILEX SOT rights and vigorously compete post-merger. These facts, along with other particulars of this transaction, allow for this well-tailored order to fit the facts, and remedy the likely competitive harm.

One concern raised by this transaction is that the remedy creates entanglements between the merged firm and Schering AG: Genzyme will continue to receive revenues post-merger from oncology sales for Campath, while Schering will receive revenues for Campath's SOT sales. It is possible that this relationship could lead to collusion (via side payments or some other mechanism) between the companies that make it mutually profitable for them to increase price or reduce research and development to the detriment of consumers.

We should be concerned ordinarily about such entanglements. However, the possibility of collusion *in this case* is not a sufficient concern for us to challenge this transaction. First, the entanglements are minimized because Campath SOT earnings can easily be determined without requiring communication between the parties since a federally-mandated independent database on organ transplants will identify the number of SOT patients using Campath. Second, the order makes use of several of the Commission's key tools to prevent this from happening (*e.g.*, employing a monitor, erecting firewalls, and the threat of civil penalties for violating the proposed order), and a violation of the proposed order through collusion could result in criminal sanctions for violating Section 1 of the Sherman Act. In the past, the Commission has demonstrated its willingness to sue companies for illegal side payments in the pharmaceutical industry (*e.g.*, *In the Matter of Schering-Plough Corp.*), and the Commission, no doubt, will remain vigilant in ensuring that we continue to do so in the future.

For these reasons, I concur in the decision of the Commission, but will remain cautious about considering future consent orders that create entanglements which could foster collusion and potentially harm consumers.